

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
JOSEPH LEFKOWITZ,	:	DETERMINATION
OFFICER OF GALIL AUTO REPAIR, INC.	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1977	:	
through February 28, 1983.	:	

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Petitioner, Joseph Lefkowitz, officer of Galil Auto Repair, Inc., 4698 Bedford Avenue, Brooklyn, New York 11235, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1977 through February 28, 1983 (File Nos. 801198 and 801489).

A hearing was commenced before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 26, 1987 at 9:15 A.M. and was continued to conclusion before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on December 8, 1987 at 9:15 A.M., with all briefs to be submitted by April 11, 1988. Petitioner appeared at the February 26, 1987 hearing by Julius S. Klein, C.P.A., and at the December 8, 1987 hearing by Jeffrey S. Stern, Esq. The Division of Taxation appeared at the February 26, 1987 hearing by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel) and at the December 8, 1987 hearing by William F. Collins, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly estimated the gasoline and repair sales of Galil Auto Repair, Inc. on the basis of external indices.

II. Whether petitioner, Joseph Lefkowitz, was a person required to collect and pay over sales tax on behalf of Galil Auto Repair, Inc. for the period at issue.

III. Whether the Division of Taxation's assessment of a fraud penalty against Joseph Lefkowitz was proper.

IV. Whether notices of determination and demands for payment of sales and use taxes due for the periods December 1, 1977 through November 30, 1980 were timely issued by the Division of Taxation.

FINDINGS OF FACT

1. Pursuant to a field audit of Galil Auto Repair, Inc. ("Galil") which commenced in May 1982, the Division of Taxation issued to Joseph Lefkowitz ("petitioner"), as officer of Galil, the

following notices of determination and demands for payment of sales and use taxes due:

<u>Date Issued</u>	<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
3/15/84	12/1/80-2/28/81	\$ 7,228.32	\$ 3,614.16	\$ 2,947.00	\$ 13,789.48
5/9/84	12/1/77-2/28/78	269,532.39	134,766.20	140,579.40	544,877.98 <sup>1</sup>
	12/1/78-2/28/82				
5/9/84	3/1/82-2/28/83	46,348.55	23,174.28	10,436.34	79,959.17
7/3/84	3/1/78-11/30/78	59,133.60	29,566.80	46,771.00	135,471.40

Each notice of determination advised petitioner that he was personally liable as officer of Galil Auto Repair, Inc. under Tax Law §§ 1131(1) and 1133 and that the tax assessed on each had been estimated or determined to be due in accordance with the provisions of Tax Law § 1138(a).

2. The Brooklyn District Office initially received the Galil file for audit from the Central Office Audit Bureau in May 1982. Included with the file was a purchase confirmation from Galil's gasoline and oil supplier, Lou Halperin Stations, Inc., for the sales tax quarter ended February 28, 1981. Lou Halperin Stations, Inc. was a distributor of Getty gasoline and oil products.

3. The file which the auditor initially received from the Central Office Audit Bureau indicated that Morton Semp was Galil's president. The auditor thereupon requested from Galil's accountant and from Mr. Semp the following books and records: general ledger; cash receipts and cash disbursements journals; Federal income tax returns; sales tax returns; purchase invoices; fixed asset invoices; exemption certificates supporting nontaxable sales; and bank statements. For nearly a year after said requests were made, no books and records were made available to the auditor.

4. On two occasions, the auditor visited the premises located at 6114 16th Avenue, Brooklyn, New York. He observed that Galil sold Getty gasoline and oil products and that it had two repair bays. Upon his second visit, the auditor learned that Galil was operating under new ownership. He attempted to obtain the new owner's name and home address from Galil's employees and from the corporation's accountant, but was unable to do so until such time (late 1983) when Mr. Semp provided him with information that petitioner and one Bernard Joseph were Galil's officers. The information was provided to the auditor as a result of assessments issued to the corporation and to Mr. Semp for the sales tax quarter ended November 30, 1980.

5. In January 1984, Galil's accountant presented to the auditor handwritten documents purporting to be Galil's cash receipts and disbursements for portions of 1981 and 1982.

6. On March 15, 1984, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (see \_\_\_, Finding of Fact "1") was issued to petitioner for the sales tax quarter ended February 28, 1981. Assessments were also issued to the corporation and to Morton Semp. The auditor had obtained the sales tax returns of Galil for the period at issue herein, and on the return filed for the quarter ended February 28, 1981 petitioner's signature appeared thereon. Prior returns had been signed by other persons or, in some instances, had been unsigned. The

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<sup>1</sup>This notice of determination advised petitioner that the assessment set forth thereon was in addition to the assessment contained in the notice of determination previously issued on March 15, 1984.

assessment issued to petitioner on March 15, 1984 was based upon the purchase confirmation obtained from Lou Halperin Stations, Inc. together with the auditor's estimate of repair sales for this quarter. The purchase confirmation indicated that Galil had purchased 46,376 gallons of gasoline at a cost of \$47,718.00 for the sales tax quarter ended February 28, 1981. To this cost the auditor added four cents per gallon in Federal excise tax plus a markup on the total of 15 percent, which resulted in taxable gasoline sales of \$57,009.00. Based upon his previous experience in auditing gasoline stations and upon his observation of Galil's operation, the auditor estimated repair sales at \$37,440.00 per quarter (\$20.00 labor + \$10.00 parts = \$30.00 per hour x 8 hours per day x 6 days per week x 2 mechanics x 13 weeks per quarter) resulting in total taxable sales of \$94,449.00, with tax due thereon in the amount of \$7,555.92. Credit was given for tax paid (\$327.60). Total tax due in the amount of \$7,228.32 was, therefore, assessed together with fraud penalty imposed pursuant to Tax Law § 1145(a)(2) and interest, for a total amount due of \$13,789.48 for the sales tax quarter ended February 28, 1981.

7. Subsequent to the issuance of the aforesaid notice of determination, the auditor, upon a careful review of the disbursements documents furnished by Galil's accountant, discovered that Galil had issued several checks to Texaco. The auditor did not attempt to obtain a purchase confirmation from Texaco. The cash deposits records provided for the period January 1981 through November 1982 indicated quarterly deposits as follows:

<u>Sales Tax Quarter Ended</u>	<u>Deposits</u>
5/31/81	\$ 96,755
8/31/81	103,903
11/30/81	228,906
2/28/82	147,605
5/31/82	82,731
8/31/82	142,441

Based upon these deposits and the fact that no records were provided relative to cash payouts and credit card sales, the auditor utilized the highest quarterly deposits and increased this amount by approximately \$21,000.00 to account for the cash payouts and credit card sales and, therefore, estimated taxable sales to be \$250,000.00 per quarter through the sales tax quarter ended August 31, 1982. For the remaining sales tax quarters at issue herein, i.e., those quarters ended November 30, 1982 and February 28, 1983, tax was assessed only on repair sales, which were estimated in accordance with the formula used in the assessment for the quarter ended February 28, 1981 (see     , Finding of Fact "6"). For these two quarters, tax was assessed on estimated repair sales of \$37,440.00 per quarter. No tax was assessed on gasoline sales for these quarters due to the amendment to Tax Law § 1101(b)(4) by Chapters 454 and 469 of the Laws of 1982 which, as of September 1, 1982, effectively imposed the sales tax on motor fuel at a higher point in the distribution chain than the point of sale by the service station. As indicated in Finding of Fact "1", supra, two notices of determination and demands for payment of sales and use taxes due were issued to petitioner on May 9, 1984 and an additional notice of determination was issued on July 3, 1984 covering, in the aggregate, the period December 1, 1977 through February 28, 1983, using estimated taxable sales of \$250,000.00 per quarter (excepting quarters ended November 30, 1982 and February 28, 1983), which estimates included both gasoline and repair sales. Credit was given for tax previously paid and, for the quarter ended February 28, 1981, tax previously assessed on March 15, 1984 in the amount of \$7,228.32 was deducted from the amount subsequently assessed by the notice of determination issued May 9, 1984. Fraud penalty pursuant to Tax Law § 1145(a)(2) and interest were also assessed for each quarter. Since a new vendor began doing business at this location in March 1983, no tax was assessed for any

period after February 28, 1983.

8. Galil and Morton Semp were also assessed for the period at issue herein. As indicated in Finding of Fact "4", Mr. Semp provided the auditor with bank records of the Community National Bank and Trust Company of New York which indicated that the Galil account was opened on July 15, 1975 with Morton Semp, president, and Bernard Joseph, vice-president and secretary, as authorized signatories. On July 14, 1978, a new corporate resolution was filed with the bank with Bernard Joseph, president, and Joseph Lefkowitz, secretary, as authorized signatories. The audit report indicated that Bernard Joseph was not assessed due to the inability of the Division of Taxation to obtain his address or social security number.

9. The auditor also obtained additional purchase confirmations for Galil from Lou Halperin Stations, Inc. for the period March 1, 1980 through December 31, 1981. However, because the cash disbursements records revealed numerous checks issued to Texaco, the auditor determined that Getty purchases from Lou Halperin were not the only gasoline purchases made by Galil. It was his opinion that these Getty purchase confirmations were not reflective of actual gasoline purchases and were, therefore, not reliable in calculating Galil's taxable sales.

10. The records of Texaco Refining and Marketing, Inc. did not reflect gasoline or oil purchases made by Galil for the period at issue.

11. Petitioner admitted that he became an officer of Galil in 1978 although he made no mention of a specific date on which he assumed office. He also stated that he was the sole officer and owner of Galil. Petitioner bought the business from Morton Semp and, although Bernard Joseph remained as a bank signatory for the corporate bank account, petitioner denied any knowledge of a Bernard Joseph.

12. Petitioner's uncle, Mr. Jozefovic, owned and operated a gasoline and repair station known as First Wythe Avenue Auto Rental Service, Inc. ("First Wythe").<sup>2</sup> Mr. Jozefovic and petitioner admitted that, during the period at issue herein, they engaged in a check kiting scheme for the alleged purpose of keeping petitioner's business (Galil) afloat. Checks were issued by First Wythe, approximately every two to three days, to various payees, many of whom were fictitious persons, and the checks were endorsed and deposited into Galil's business account at the Community National Bank and Trust Company of New York. Mr. Jozefovic admitted that he often left the payee's name blank and that petitioner would fill in the name of a payee and then deposit the check into Galil's account. The stated purpose of this scheme of issuing frequent checks by Galil and First Wythe was to conceal from the bank the fact that there were, in actuality, insufficient funds to cover many of the checks issued by each. The proceeds of these checks were admittedly used by petitioner for both business and personal purposes. Because Mr. Jozefovic usually needed to be repaid almost immediately, checks were drawn on Galil's account and, in most instances, were made payable to Texaco, Mr. Jozefovic's supplier. On the cash receipts and disbursements documents furnished to the auditor, these checks were entered under the column designated "gas". For the months included on the disbursements documents, checks designated "payroll" were also issued to B. Joseph, always in the amount of \$252.77 (three to five of these checks per month) and always at or about the same time that checks in the identical amounts were issued to petitioner.

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<sup>2</sup>Nowhere, including the hearing record, is Mr. Jozefovic's first name disclosed.

13. An examination of the sales tax returns filed by Galil for the quarters ended February 28, 1978, August 31, 1978 and February 28, 1982; the corporate resolutions filed with the Community National Bank and Trust Company of New York on July 15, 1975 and July 14, 1978; and the checks issued by First Wythe which were deposited in Galil's account clearly indicate that Mr. Jozefovic is, in fact, Bernard Joseph. The fact that Bernard Joseph was an authorized signatory for Galil both prior to and during the audit period, that he received regular payroll checks from Galil and that he signed sales tax returns for Galil for various quarters within the audit period is presumptive evidence that, while Mr. Jozefovic (Bernard Joseph) was the owner and operator of First Wythe, he was also actively involved in the operations of Galil despite petitioner's statements that he did not know who Bernard Joseph was (see \_\_\_\_, Finding of Fact "11").

14. For each of the sales tax quarters at issue herein, Galil reported taxable sales of between \$3,000.00 and \$7,000.00 on its sales tax returns. Many of the returns filed were incomplete and several returns were not timely filed. The amount of gross sales was often omitted and, in instances where gross sales were reported, the amounts thereof were identical to taxable sales.

#### SUMMARY OF THE PARTIES' POSITIONS

15. Petitioner's position is as follows:

(a) Galil did not purchase or sell Texaco gasoline and, while several checks were issued by Galil to Texaco, said checks were merely repayments of loans from petitioner's uncle, Mr. Jozefovic, whose own supplier was Texaco.

(b) The audit method utilized by the Division of Taxation does not accurately reflect Galil's taxable sales for the following reasons:

(1) Use of Galil's deposits to compute taxable sales is not realistic because of the check kiting scheme, i.e., most of the deposits were loans from Mr. Jozefovic, most of which were almost immediately repaid (except for the sum of \$20,000.00 which petitioner and Mr. Jozefovic contend is still due and owing from Galil to First Wythe).

(2) Even if such a deposit analysis was a proper audit method, the Division's use of the highest quarter of deposits (and then adding approximately \$21,000.00 for cash payouts and credit card sales) rather than an average of all quarterly deposits results in a highly inflated assessment. Petitioner admits having had credit card sales, but denies ever having made cash payouts for gasoline.

(3) Approximately 80 percent of his gasoline and repair services were sold to four religious schools: United Talmudical Academy; Yeshiva Imrei Yosef; Yeshiva Kehilath Yakov; and Yeshiva Ch'san Sofer. Affidavits from officers of each organization indicate that, for the audit period, said organizations purchased from \$7,500.00 to \$10,500.00 in gasoline and repair services from Galil per quarter. Such affidavits also state that each organization possessed a numbered exempt organization certificate. Petitioner contends that he did not require the schools to execute exemption certificates for each sale, but that, after being shown the numbered exempt organization certificate upon such school's agreement to use Galil, exclusively, for its vehicle repairs and gasoline purchases, he merely allowed school officials and vehicle operators (school buses, vans and passenger autos) to sign for each purchase. On each invoice, petitioner alleges

that he or his employees would note the bus number or license plate number on the invoice, have the operator sign the invoice and charge the school based upon an 8 percent (for sales tax) discount, although no sales tax was computed or separately stated on the invoice. At the hearing, sales invoices representing alleged sales to two of these schools for the period September 1981 through January 1982 were presented. It must be noted that no sales invoices were ever made available to the auditor during any stage of the audit process.

(4) The Division of Taxation had purchase confirmations from Galil's supplier which more accurately reflected the station's gasoline sales. By combining these sales with estimated repair sales (petitioner contends that the auditor's estimates of repair sales were inflated based upon his allegation that the station was open only from 8:00 A.M. to 5:00 P.M. on Monday through Thursday and from 8:00 A.M. to noon on Friday), a far more reliable estimate could have been made.

(c) Petitioner's station had a gasoline storage capacity of 2,000 gallons. He purchased approximately 1,000 gallons of Getty gasoline every three days. By reason of these facts, Galil had no capacity to store additional gallons of gasoline allegedly purchased from Texaco. In addition, the fact that the station had only two pumps would preclude it from ever being able to pump the amount of gasoline which the Division of Taxation contends was purchased from both Getty and Texaco.

(d) In addition to the loans and exchanges between Galil and First Wythe, petitioner, due to poor business conditions, borrowed the sum of \$9,550.00 from another relative, Albert Silberberg, in 1981 which amount, in addition to the checks received from Mr. Jozefovic, should be deducted from Galil's deposits in the determination of its taxable sales.

16. The position of the Division of Taxation is as follows:

(a) Due to the fact that purchase confirmations were not available for the entire audit period and, furthermore, because there was evidence of substantial purchases from Texaco, an assessment based upon sales of Getty only would not be representative of Galil's actual sales.

(b) The check kiting scheme engaged in by petitioner and Mr. Jozefovic was designed not only to preserve the liquidity of their business checking accounts, i.e., to cause the banks to believe that money existed where, in reality, it did not, but to deliberately conceal receipts so as to permit petitioner to retain, for his own benefit, sales tax monies collected.

(c) Since there were no source documents made available to the auditor and since cash receipts records were provided for only a limited portion of the audit period, it can reasonably be inferred that deposits for certain other quarters were greater than the approximately \$228,000.00 for the quarter ended November 30, 1981. Therefore, use of this quarter (and increasing it by \$21,000.00 to account for credit card sales and cash payouts) rather than an average of the six quarters for which records were provided was a reasonable audit method.

### CONCLUSIONS OF LAW

A. Tax Law § 1135(a) requires every person required to collect sales tax to keep records of every sale and of the tax payable thereon. "Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum" (Tax Law § 1135[a]). Tax Law § 1138(a)(former [1]) provided that if a sales tax return "is not filed, or if a return when filed is

incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices...."

B. In determining the amount of a sales tax assessment, it is the duty of the Division of Taxation to select a method "reasonably calculated to reflect the taxes due" (Matter of Grant Co. v. Joseph, 2 NY2d 196, 206). (Matter of Meyer v. State Tax Commn., 61 AD2d 223, 227, lv denied 44 NY2d 645.) "The burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or amount of the tax assessed was erroneous" (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858).

C. Since Galil failed to maintain complete books and records of its business, resort to external indices by the Division of Taxation was appropriate (Matter of Urban Liquors v. State Tax Commn., 90 AD2d 576). It must, therefore, be determined whether or not the ultimate audit method employed by the Division of Taxation was a method which was "reasonably calculated to reflect the taxes due" (Matter of Grant Co. v. Joseph, supra).

Petitioner argues that, since purchase confirmations from Galil's gasoline supplier (Lou Halperin Stations, Inc.) were available for a substantial portion of the audit period (March 1, 1980 through December 31, 1981), the assessment should have been based upon said confirmations of Getty gasoline together with estimated repair sales. However, the auditor, having ascertained that frequent, sizable checks had been issued by Galil to Texaco, determined that an assessment based upon Getty sales alone was not representative of Galil's actual sales. What must first be addressed, therefore, is whether or not the auditor's determination that Galil purchased and sold Texaco gasoline and oil products was reasonable under the circumstances herein.

Petitioner contends that all checks issued by Galil to Texaco were loans and exchanges, i.e., that as part of the check kiting scheme between Galil and First Wythe, checks were issued by Galil to Texaco (First Wythe's supplier) solely to repay prior loans. In support of this contention, petitioner points to the fact that Texaco's records indicate no sales or deliveries to Galil during the audit period. However, the determination as to whether or not petitioner's contentions should be upheld turns on his credibility and that of his witnesses (most notably, Mr. Jozefovic).

As indicated in Finding of Fact "13", supra, it is quite obvious that Mr. Jozefovic, owner and operator of First Wythe, and Bernard Joseph, officer, employee, signer of sales tax returns and authorized bank signatory of Galil, are one and the same. Yet petitioner denies any knowledge of a Bernard Joseph. From an examination of the corporate resolutions filed with Galil's bank on July 15, 1975 and on July 14, 1978, it is clear that Bernard Joseph's association with Galil began prior to and continued during that of petitioner. The alleged loans and exchanges (check kiting) were, therefore, more than a benevolent gesture on the part of an uncle towards his nephew; they were a series of acts which were necessary to keep Galil solvent and thereby protect Bernard Joseph's business interest. These facts render the testimony of both petitioner and Mr. Jozefovic totally unworthy of belief. It is quite possible and even probable that what petitioner categorized as loans and exchanges also consisted of an exchange of product, i.e., that First Wythe and Galil, in addition to exchanging checks, also exchanged inventory. The auditor's assumption that Galil made sales of Texaco gasoline is, therefore, reasonable under the circumstances herein.

D. As indicated in Finding of Fact "7", the auditor examined the cash receipts and deposits of Galil which were provided for six of the sales tax quarters at issue. Quarterly deposits ranged from \$82,731.00 to \$228,906.00. The auditor utilized the largest of said deposits (\$228,906.00), increased it to \$250,000.00 to account for credit card sales and cash payouts, and assessed petitioner based upon quarterly taxable sales of \$250,000.00. Although petitioner admits having made some credit card sales (see \_\_\_, Paragraph "15[b][2]"), no evidence has been presented to justify the increase of deposits by approximately \$21,000.00 to account for these sales and payouts. Accordingly, this arbitrary increase of deposits must be excised. In addition, while it is true that such receipts and deposits records were not available for the entire audit period, the auditor did choose to utilize these records to calculate the assessment. The deposits for the quarter ended November 30, 1981 were approximately \$80,000.00 higher than the deposits for any of the other quarters for which records were provided. It is hereby found that use of the highest quarterly deposits was not reasonable. An average of the six quarters (\$133,723.50) shall, therefore, be substituted for the \$250,000.00 as quarterly taxable sales.

E. 20 NYCRR 529.7(h)(2) provides that for sales to exempt organizations, in order to exercise its right to said exemption, the organization must furnish its vendors with a properly completed exempt organization certificate. Petitioner did not require its religious school customers to provide such a certificate; he stated that he was merely shown a numbered certificate of exemption and permitted the drivers of the schools' vehicles (including passenger vehicles) to sign the invoices. Such invoices were never presented to the auditor at the time of the audit. Invoices for a five-month period were presented at the hearing (September 1981 through January 1982) along with affidavits from officers of the four religious schools for which a sales tax exemption is sought. Moreover, sales tax was not separately stated on these invoices; petitioner testified that he simply discounted the price on the invoice by 8 percent to account for the sales tax. Since petitioner failed to obtain and/or retain exemption certificates and since only a limited number of invoices were made available at the hearing (and none during the audit), petitioner's contention that the assessment should be reduced by exempt sales to religious schools is hereby rejected in its entirety.

F. The only evidence utilized by the auditor in determining that petitioner was a person required to collect and pay over sales tax on behalf of Galil pursuant to the provisions of Tax Law §§ 1131(1) and 1133(a) was the sales tax returns (the first return signed by petitioner was for the quarter ended February 28, 1981) and the corporate resolution filed with Galil's bank on July 14, 1978. Petitioner admits (see \_\_\_, Finding of Fact "11") that he became the owner, operator and an officer of Galil in 1978, although the record is devoid of a date on which petitioner assumed these titles. The assessments must, therefore, be modified by cancelling, in their entirety, assessments issued against petitioner for the sales tax quarters ended February 28, 1978 and May 31, 1978 and by reducing, by 50 percent, the assessment issued for the quarter ended August 31, 1978.

G. Tax Law § 1145(a)(2) was added by Laws of 1975 (ch 287, §2). During the period in issue, this paragraph provided:

"If the failure to file a return or pay over any tax to the tax commission within the time required by this article is due to fraud, there shall be added to the tax a penalty of fifty percent of the amount of the tax due (in lieu of the penalty provided for in subparagraph (i) of paragraph one), plus interest...."

Tax Law § 1145(a)(2) was enacted by the Legislature with the intention of having a penalty provision in the Sales and Use Tax Law which was similar to that which already existed



in the Tax Law with respect to deficiencies of, inter alia, personal income tax (1975 NY Legis Ann, at 350). Thus, the burden placed upon the Division of Taxation to establish fraud at a hearing involving a deficiency of sales and use tax is the same as the burden placed upon the Division in a hearing involving a deficiency of personal income tax. A finding of fraud at such a hearing "requires clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing" (Matter of Walter Shutt and Gertrude Shutt, State Tax Commission, June 4, 1982).

The Division of Taxation has sustained its burden of proof with respect to the imposition of the fraud penalty against petitioner for the following reasons:

- (1) Petitioner failed to maintain and/or provide books and records for the audit period.
- (2) Petitioner filed returns which were incomplete and, often, unsigned.
- (3) Petitioner continuously and substantially underreported taxable sales on the returns filed for the quarters at issue.
- (4) Petitioner knowingly concealed the involvement of his uncle, Mr. Jozefovic a/k/a Bernard Joseph, in the business of Galil.
- (5) Petitioner and the said Mr. Jozefovic a/k/a Bernard Joseph knowingly and willingly engaged in a course of conduct (check kiting) which was designed to deceive banks into believing that funds existed to cover checks drawn on the accounts of both Galil and First Wythe when, in fact, such funds did not exist. It can reasonably be inferred that the entire scheme was devised to deceive and defraud lending institutions, creditors and the State of New York since such scheme rendered it nearly impossible to trace funds, inventory and sales.

Fraud may be shown by surveying a taxpayer's entire course of conduct and drawing reasonable inferences therefrom (see \_\_\_, Korecky v. Commr., 781 F2d 1566; Biggs v. Commr., 440 F2d 1, 5). An examination of petitioner's course of conduct can lead only to the conclusion that he willfully, knowingly and intentionally committed acts or omissions designed to facilitate underpayment of sales taxes due and owing to the State.

H. Tax Law § 1147(b) provides that "except in the case of a willfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return...."

Based upon the determination that the fraud penalty was properly imposed by the Division of Taxation herein, it must, therefore, follow that each of the notices of determination were timely issued to petitioner.

I. The petition of Joseph Lefkowitz, officer of Galil Auto Repair, Inc., is granted to the extent indicated in Conclusions of Law "D" and "F"; the Division of Taxation is hereby directed to modify the notices of determination and demands for payment of sales and use taxes due

issued March 15, 1984, May 9, 1984 and July 3, 1984 accordingly; and, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York  
December 8, 1988

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE